

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM *
OF DANIEL & CYNTHIA STERNER, *
CLAIMANTS ***

CASE NO. 2019-RE-153

v. *

OAH NO. DLR-REC-22-19-03971

**THE MARYLAND REAL *
ESTATE COMMISSION *
GUARANTY FUND FOR THE *
ALLEGED MISCONDUCT OF *
DAVID HERBST, RESPONDENT ***

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 15, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of August, 2019, hereby **ORDERED**:

A. That the Findings of Fact in the recommended decision be, and hereby are **AFFIRMED** and **AMENDED** as follows:

3. On September 25, 2017, the Claimants and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimants.¹

B. That the Conclusions of Law in the recommended decision be, and hereby are, **APPROVED**.

C. That the Recommended Order in the recommended decision be, and hereby is, **ADOPTED** and **AMENDED** as follows:

ORDERED that once this Proposed Order becomes a Final Order and all

¹ The Commission notes the following harmless typographical error requiring correction for clarity only:

- On page 2 of the recommended decision the ALJ identifies exhibits including GF Ex.4 which is dated April 18, 2019, not March 14, 2019.

rights to appeal are exhausted, the Claimants, **Daniel and Cynthia Sterner**, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Six Thousand One Hundred Ten Dollars (\$6,110.00)**;

ORDERED that all real estate licenses held by the Respondent, **David Herbst**, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law and application for reinstatement is made;

D. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Recommended Decision of the Administrative Law Judge required modification because it omitted from the recommended order that Respondent's license be suspended until the Maryland Real Estate Guaranty Fund (and any interest) is repaid and included minor typographical errors.

F. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

G. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant

resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

August 21, 2019

Date

By: SIGNATURE ON FILE

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<p>IN THE MATTER OF THE CLAIM</p> <p>OF DANIEL & CYNTHIA STERNER,</p> <p>CLAIMANTS</p> <p>v.</p> <p>THE MARYLAND REAL ESTATE</p> <p>COMMISSION GUARANTY FUND</p> <p>FOR THE ALLEGED MISCONDUCT</p> <p>OF DAVID HERBST,</p> <p>REAL ESTATE BROKER,</p> <p>RESPONDENT</p>	<p>* BEFORE LORRAINE E. FRASER,</p> <p>* ADMINISTRATIVE LAW JUDGE,</p> <p>* THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH CASE No. DLR-REC-22-19-03971</p> <p>* MREC COMPLAINT No. 19-RE-153</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>
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RECOMMENDED DECISION

STATEMENT OF THE CASE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 14, 2018, Daniel and Cynthia Sterner (Claimants) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$6,110.00 for monetary losses allegedly incurred by the Claimants as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimant for real property located at 1801 Atlantic Avenue, Unit 407, Ocean City, Maryland (the Property).

On January 28, 2019, the REC issued an Order for Hearing. On February 4, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On April 22, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimants represented themselves. The Respondent represented himself. Andrew Brouwer, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and COMAR 28.02.01.

ISSUES

The issues are whether the Claimants sustained an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud; and, if so, the amount of the loss.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Fund:

- GF Ex. 1 Hearing Order, 1/28/19
- GF Ex. 2 Notice of Hearing, 2/13/19
- GF Ex. 3 Complaint, 9/14/18
- GF Ex. 4 The Respondent's licensing history, 3/14/19

I admitted the following exhibits into evidence on behalf of the Claimants:

- Cl. Ex. 1 Ledger of the Claimants' rental income and expenses for 2018

- Cl. Ex. 2 Email from the Claimants to the REC, 9/15/18, including their complaint, 9/14/18
- Cl. Ex. 3 Letter from the Respondent's brother, 9/7/18
- Cl. Ex. 4 Rental agreement for September 2017 through December 2018, 9/25/17
- Cl. Ex. 5 Handwritten statement of Claimant Daniel and ledger of rental income and expenses for 2018
- Cl. Ex. 6 Statement from the Respondent, 2/2/18; deposited income, 2/8/18; Statement from the Respondent 2/28/18; deposited income, 3/29/18; Statement from the Respondent, 4/10/18; deposited income, 5/22/18; Statement from the Respondent, 7/10/18; Statement from the Respondent, 5/18/18; deposited income, 6/4/18; email to the Respondent, 7/10/18; Statement from the Respondent, 8/1/18; deposited income, 8/13/18

I admitted the following exhibits into evidence on behalf of the Respondent:

- Resp. Ex. 1 Letter from the Respondent's brother and sister-in-law, 4/22/19
- Resp. Ex. 2 Medical information from Anna T. Monias, M.D., Gilchrist Greater Living at Broadmead
- Resp. Ex. 3 Medical information from Anna T. Monias, M.D., Greater Baltimore Medical Center
- Resp. Ex. 4 Sinai Driving Evaluation and Training Program Recommendations and Follow up, 2/4/19
- Resp. Ex. 5 Driver's License Suspension, 2/8/19
- Resp. Ex. 6 Reporting Officer Narrative, Ocean City Police Department, 9/10/18; Case Supplemental Reports, 11/21/18 and 12/20/18
- Resp. Ex. 7 Notice of foreclosure sale of the Respondent's property located at 7802 Coastal Highway, Ocean City, Maryland, 21842
- Resp. Ex. 8 Notice of Intent to Foreclose on the Respondent's property located at 7804 Coastal Highway, Ocean City, Maryland, 21842

Testimony

Claimant Daniel testified.

The Respondent testified.

The Fund presented no testimony.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Claimants are the owners of the Property, a condominium unit located in Ocean City, Maryland.
2. At all times relevant to this case, the Respondent was a licensed real estate broker who provided property management services, handling the rentals of condominium units in Ocean City, Maryland.
3. On September 18, 2017, the Claimants and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimants.
4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimants. The Claimants paid the Respondent 15% of the gross rental for weekly rentals the Respondent obtained.
5. The Respondent obtained a tenant and collected \$5,600.00 in rent on behalf of the Claimants for July 7 through 14, 2018 and July 14 through 21, 2018. However, the tenant for those two weeks cancelled on July 6, 2018 because he needed emergency surgery. The Claimants should have received the deposit minus the commission in the amount of \$980.00 for each week for a total of \$1,960.00. The balance should have been returned to the tenant. The Claimants did not receive \$1,960.00 and the tenant did not receive any money.
6. The Respondent obtained tenants and collected rent for the following weeks or partial weeks on behalf of the Claimants: July 11 through 13, 2018, July 21 through 28, 2018, July 28 through August 4, 2018, August 4 through 11, 2018; August 11 through 18, 2018; and August 18 through 25, 2018.

7. The Claimants charged \$2,800.00 per week for July 7 through August 4, 2018; \$3,000.00 for August 4 through 11, 2018; \$2,800.00 for August 11 through 18, 2018; and \$2,500.00 for August 18 through 25, 2018.

8. The Claimants charged \$1,000.00 for the July 11 through 13, 2018 partial week rental.

9. After subtracting the Respondent's 15% commissions, the Claimants should have received \$12,665.00 for the rentals ($\$2,800.00 + \$2,800.00 + \$3,000.00 + \$2,800.00 + \$2,500.00 + \$1,000.00 = \$14,900.00 \times .85 = \$12,665.00$) and the \$1,960.00 forfeited deposit, for a total of \$14,625.00.

10. The Respondent remitted \$8,515.00 to the Claimants.

11. The Respondent still owes the Claimants \$6,110.00 ($\$14,625.00 - \$8,515.00$).

DISCUSSION

The burden of proof at a hearing on a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). Section 17-404 of the Business Occupations & Professions article governs all claims brought against the Fund and sets forth the following criteria that must be established by a claimant to obtain an award:

(a)(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson; or
4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
2. that constitutes fraud or misrepresentation.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2018). *See also* COMAR 09.11.01.14.

Claimant Daniel in this case testified and submitted documents showing that the Property was rented through the Respondent during the weeks or partial weeks of July 11 through 13, 2018, July 21 through 28, 2018, July 28 through August 4, 2018, August 4 through 11, 2018; August 11 through 18, 2018; and August 18 through 25, 2018. The Claimants also submitted evidence showing the total amount they were owed and the partial payments they received from the Respondent. The evidence shows the Respondent still owes the Claimants \$6,110.00.

The Respondent testified that he had a number of strokes that affected his memory and now has dementia. He submitted documentation regarding his medical condition. He stated that he did not intentionally take money from his customers and apologized. However, he could not explain what happened to the money he owed the Claimants. Further, the Respondent has not paid the Claimants the money he owes them as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimants and disburse those funds to the Claimants but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimants constituted a misrepresentation. The Fund recommended an award to the Claimants of \$6,110.00.

Therefore, I find the Claimants are entitled to an award from the Fund in the amount of \$6,110.00 for their actual loss based on the Respondent's misrepresentation in the provision of real estate services.

CONCLUSIONS OF LAW

Based on the above Findings of Fact and Discussion, I conclude as a matter of law that the Claimants sustained an actual loss compensable by the Fund due to an act or omission of the Respondent in which money was obtained on behalf of the Claimants but not remitted in full to the Claimants, which constitutes misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018). I further conclude as a matter of law that the Claimants are entitled to receive an award from the Fund in the amount of \$6,110.00. *Id.*; COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimants against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of \$6,110.00.

SIGNATURE ON FILE

July 15, 2019
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge

LEF/kdp
181012

DECLARATION

I, the undersigned, do hereby declare that the above is a true and correct copy of the original as submitted to me by the applicant.

Date: 18/11/2018

Signature of the undersigned

I, the undersigned, do hereby declare that the above is a true and correct copy of the original as submitted to me by the applicant.

SIGNATURE ON FILE